No. 9220

United States
COURT OF APPEALS
for the Ninth Circuit

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

On Appeal from the United States District Court for the District of Oregon.

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REPLY BRIEF OF APPELLANT MARTHA JORDAN

The judgment entered in the court below should be reversed for the following reasons and in reply to Appellee's answering brief.

The injury to the Appellant was non-maritime; the "place of wrong" was Portland, Oregon.

The appellee cites the case of *Tate v. C. G. Willis, Inc.*, (D. Ct. E. D. Va. 1957), 154 F. Supp. 402 as

holding "that the *domiciliary administratrix* had no action against a shipowner for loss of her seaman-husband's consortium when negligently killed aboard a vessel by reason of the Court dismissing without comment libelant's second cause of action alleging loss of consortium." If that is the holding of the court, then the decision in no way conflicts with the appellant's contentions heretofore set forth. The appellant is suing in the case presently before the bar in her capacity as the wife of the injured seaman and that is the only capacity in which recovery for loss of consortium can be had, and certainly not in the capacity of a deceased seaman's administratrix, but as the widow of the deceased seaman. The court, upon the appellee's interpretation of the case, could have decided the case on this point alone. However, the appellant is of the opinion that since the title of the case is "Daphene P. Tate, as administratrix of the estate of George Archie Tate, deceased, and in her own right as widow, . . ." that in fact the court held that the plaintiff could not recover for loss of consortium in her capacity as the widow of her deceased husband, under the Jones Act. 46 U.S.C.A. 688. But, the case is distinguishable from the instant case since there the appellant's action was brought under the Jones Act. Also, the decision is weakened by the libelant's request, in their brief, that a non-suit be entered as to the second cause of action in which damages was sought for loss of consortium. The court held that under the Jones Act, there could be no recovery for loss of consortium without comment.

The appellee cites the Restatement, Conflict of Laws, Section 377, as a point of departure which reads,

> "The *place of the wrong* is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

It would seem then, that the appellee recognizes the Restatement as proper authority for determining the place of the tort as applicable to the instant case. In the comment (a) of this section, it is said:

> "If *consequences* of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof."

The appellee contends that the courts which use the terminology "where the damage is done" or "where the harm ensued" rather than the phrase "the last event necessary," do so in the physical impact cases where the *place* of damage and the *place* where the last event necessary to render the actor liable coincide. This is not an accurate statement as is pointed out in example 5 of Section 377, which does not involve a physical impact situation but injury to one's reputation.

> "Where harm is done to the reputation of a person, the place of the wrong is where the defamatory statement is communicated."

As is stated in 86 C.J.S., Torts, Section 24,

> "As to transitory torts, the law of the place where the injury is occasioned or inflicted governs in respect of the right of action. . . ."

In an action for fraud and deceit, the place of the wrong is the place where the loss is sustained. *Smyth Sales v.*

Petroleum Heat and Power Company (CCANJ), 128 F.2d 697, and authority cited therein.

Thus, it is seen that in non-physical impact cases the place of the wrong is the place where *the loss is sustained.*

Counsel for the appellee states that counsel for the appellant-wife would perhaps not have been confused by generalities expressed in cases nor contended that the place of the wrong in the case at bar was in Oregon, had counsel paid heed to an article written by Walter Wheeler Cook, Tort Liability and the Conflict of Laws, 35 Col. L. Rev. 202. It is submitted that counsel for the appellee, not counsel for the appellant-wife, is the one who is confused. First, the article was neither cited in the appellant's brief, nor read by counsel until he read the appellee's answering brief. Secondly, if counsel himself cared to cite the law as Mr. Cook found it he would have cited to the court the following language which appears at page 212 of the article:

> "The fact remains that American courts do in general 'apply' the 'law', or, rather, purport to apply, the 'law' of the place where the 'harm occurs' rather than the place of acting."

Also, Mr. Cook's article is confined to a criticism of the Restatement in its present form so far as it relates to Tort obligations, which is the very work that the appellee cites for its authority.

See *The Russell No. 6,* 42 F. Supp. 904, which was a proceedings in admiralty which states that "tort jurisdiction in Admiralty depends upon the *locality of the*

injury, or occurrence, and does not extend to injuries caused to persons or property on the land where the state law is applicable."

The appellee refers the court to the Restatement, Conflict of Laws, Section 391 and makes the point that the "place of wrong" for determining the right of action for the death is "not where pecuniary loss is caused to his relatives." But the court's attention is directed to Comment (b) which reads:

> "It is the law of the place of wrong (see Section 377) and *not that of the place where the defendant's conduct occurs* or the place of death which governs the right."

Therefore, whether there is survival of the right to recover for damages incurred, depends upon the place where the damage was done or the harm ensued or the injury takes place, though the death of the injured party is a condition precedent to its accrual. While the action lies to recover damages for death, death does not constitute the tort. The fact of death is not the tort but the consequence of the tort. The loss to the surviving relatives, being derivative and not an independent tort, is controlled by the law of the place where the deceased was injured. In a death action what is in effect said, is that the injured party who has since died cannot maintain an action for the wrongful conduct of the tortfeasor, so his personal representative or designated beneficiaries may maintain the action and recover what the deceased could have recovered had he in fact survived.

The appellant-wife is seeking recovery for her independent loss of her husband's society, love, assistance

and the natural right to bear children and to be a mother. These are the protected rights which the appellant has lost; her injured husband did not and could never recover damages for the independent loss his wife has suffered; being an independent wrong to the wife, her right of action is not derivative. The rule in negligence cases is that where in the natural and continual sequences, an injury is produced which, but for the negligent act would not have occurred, the wrongdoer will be liable, and under the applicable rule of conflict of laws, the place of the injury is the place of the wrong. Therefore, the law of Oregon prevails as to the appellant's cause, as she is seeking redress for a non-maritime tort.

The locality test is the rule applied for determination of admiralty jurisdiction, that is the tort is deemed to occur, not where the wrongful act or ommission has its inception, but where the act or ommission produces such injury as to give rise to a cause of action. *The Plymouth* (1865), 3 Wall. 20, 18 L. Ed. 125; *Todd Shipyards Corp. v. Harbor Side Trading and Supply Company* (DCEDNY 1950), 93 F. Supp. 601; *Lacey v. L. W. Wiggins Airways, Inc.,* (D.C. Mass. 1951), 95 F. Supp. 916; *The Russell No. 6,* 42 F. Supp. 904; Benedict Admiralty, 128 (6th Ed. 1940).

Applying the State of Oregon's Married Woman's Act is merely giving territorial effect to the law of the "place of wrong."

The Oregon Married Women's Act (ORS 108.010) is not given extra-territorial effect as contended by appellee, but to the contrary enforces the right created by the state for an injury suffered by appellant within the state. Here the wrongful conduct originated outside the state, but the resulting injuries were sustained by appellant within Oregon. The place of the wrong is not extra-territorial. To apply the law of the State of Delaware would be giving extra-territorial effect to the law of that state under the circumstances of the instant case. The appellant was not constructively upon any territory of the State of Delaware (SS COTTON STATE), but rather wrongful conduct which occurred upon the constructive territory of Delaware resulted in direct injury to the appellant in Oregon.

Appellant's action does not encroach upon the uniformity or characteristics of maritime law.

Before the passage of the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C.A. 761-767, there was no question but what the state Wrongful Death Statutes did not encroach upon the uniform application of maritime law even though death occurred upon the high seas. *McDonald v. Mallory,* 77 N.Y. 546; *The E. B. Ward, Jr.* (1883, CCED La.), 17 Fed. 456; *The Hamilton* (1907), 207 U.S. 398, 52 L. Ed. 264. And only by the passage of this Act was the state law ousted; state law had controlled even though the tort involved was admittedly

maritime. If this did not constitute an interference with the uniform application of maritime law, how can it be properly urged that the application of state law to a non-maritime tort is such an interference as would necessitate the deprival of appellant's right of recovery? This is a matter of local concern as between the appellant and the appellee and the independent right of recovery of the husband in no way changes the local character of *this* action.

The fact that ship owners have encroached upon seamen's wives right of consortium, without being held liable does not vindicate the appellee of liability to the appellant; where there is a right there is a remedy for an unwarranted interference with that right. A wife has the right to the society, companionship, love, assistance and sexual relation with her husband regardless of the calling of her husband. In makes little difference whether he be a seaman, a travelling salesman or a farmer.

Appellee says it is too late to say that appellant's action for loss of consortium merely supplements maritime law because Congress has pre-exempted the field.

The appellant is not contending that her cause of action for loss of consortium merely supplements maritime law, but rather that the tort involved is non-maritime.

Recovery by the appellant will not affect the uniform application of the Jones Act since appellant is not bringing her action under the provisions of that Act; she is not asserting a right granted by federal law,

but a right rooted in state law. *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 1942 A.M.C. 1645. The breach of duty was not a maritime tort as to the appellant though her cause of action arose simultaneously with that of her seaman husband.

If it be held that the tort to the appellant wife be in fact a maritime tort, then there is authority for allowing recovery in an action of this nature.

In *Plummer v. Webb,* Fed. Case No. 11,233, 4 Mason 380 (1827), a libel was filed in admiralty in the nature of an action per quod servitium amisit. The libelant-father consented to a voyage to be made by his minor son. The son later died from mistreatment while subjected to an unauthorized voyage. The court held that a father may maintain a suit in admiralty for the tortious abduction of his minor son on a voyage on the high seas, but because the case was not wholly within the jurisdiction of admiralty remitted the parties to their action at *common law.*

The Sea Gull, Fed. Cas. No. 12,578 (1865), involved a collision which occurred just outside the port of Baltimore in which the libelant's wife was killed by the alleged fault of the Sea Gull; this was a libel in rem. The court after noting that the common law cases have held that personal actions die with the person, said that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." This same reasoning could apply to the appellant's claim for recovery for loss of consortium.

A father whose minor child had been injured on shipboard by a collision between two vessels in New York harbor sought and recovered damages for the loss of services of his minor son in *Moses v. Hamburg-American Packet Co., et al,* (DCSDNY 1898) 88 Fed. 329. The father filed a libel in personam.

In *New York and Long Branch Steamboat Co. v. Johnson, et al,* (CCA 3rd Cir. 1912), 195 Fed. 740, Mrs. Johnson was injured in a collision while a passenger on a steamboat enroute from New York to Long Branch. For alleged negligence in causing her injury she filed an action in the New Jersey state court. Her husband brought a similar suit for the injury sustained by him through said injury to his wife. The defendant filed a libel in admiralty for limitation of liability and both the husband and wife filed an answer to the libel, and both parties recovered damages. Mr. Johnson's claim was recoverable in admiralty.

Appellant-wife is not precluded from claiming damage for loss of her right of consortium merely because her husband is a sailor.

Appellee in its brief admits that the appellant has lost her right of consortium but contend that her loss is minimal. It is submitted that the appellee is arguing the amount of damages appellant has sustained and not whether her complaint states a cause of action.

However, it would seem that the faithful wife of a seaman would suffer a much greater loss than the wife of a homeguard husband who is absent from the home only about eight hours a day. The anxiety of waiting

for months for the return of her seaman mate and then to have him return in his disabled and non-functional condition, must be the epitome of frustration to a loving and devout wife. The desire for conjugal relations and society increase exponentially with the passage of time, or at least absence makes the heart grow fonder.

There is no evidence indicating that the appellant has permitted her husband to follow the sea and the appellee is merely speculating. But assuming arguendo that she did consent, it is a non-sequitur to say that she also consented to release her right to recover damages for the injury inflicted upon her by the wrongful conduct of a ship-owner.

WHEREFORE, the Appellant prays that this Court reverse the judgment entered below and that the cause be remanded to the trial court.

Respectfully submitted,

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